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No. 281

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In the Supreme Court of the United States

OCTOBER TERM, 1968

WILLIAM H. KENNER, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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On September 10, 1966, William H. Kenner, appearing *pro se* on behalf of himself, his wife, and Kenner's Charitable Hospital, Inc., filed a sworn petition with the Tax Court praying that the court request that the Attorney General undertake an investigation of fraud allegedly practiced upon that court. The proceedings allegedly tainted by fraud had culminated in a decision[1] that had become "final" more than three years earlier, by virtue of Section

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[1] *Kenner* v. *Commissioner*, 20 T.C.M. 185 (1961), affirmed, 318 F. 2d 632 (C.A. 7, 1963) (Pet. App. 1a).

7481(2)(A) of the Internal Revenue Code of 1954. In the request for an investigation, petitioners recited many factual errors said to have been committed by the Tax Court in the 1961 proceeding and charged that the proceeding itself was the product of a corrupt and illicit conspiracy on the part of Internal Revenue agents and petitioners' own attorneys (Pet. App. 5a). The Tax Court directed that the petition be "lodged" with it, stating that it lacked jurisdiction to act upon it. Treating petitioners' application for an investigation as a motion to set aside the final order of the Tax Court in the 1961 proceeding, and deeming the action of the Tax Court in "lodging" the request as a dismissal for lack of jurisdiction, the court of appeals granted petitioners' request for permission to appeal. (Pet. App. 1a.)

After the case had been fully briefed, the court held, as the Commissioner urged, that the Tax Court has jurisdiction to inquire into the integrity of its otherwise "final" decisions where circumstances demonstrate palpable fraud on the court (Pet. App. 4a). The court of appeals ruled, however, that the circumstances averred did not with adequate particularity suggest that fraud had been practiced on the Tax Court in connection with the 1961 proceeding (Pet. App. 5a). Accordingly, it affirmed the Tax Court's "dismissal" of the petition.

ARGUMENT

The decision below is correct. There is no conflict of decisions or any other reason warranting review by this Court.

1. Rule 9(b), F.R. Civ. P., expresses the traditional standard that in any averment of fraud, the circumstances believed to constitute the fraud must be alleged with particularity. Where the type of fraud charged is fraud upon the court,[2] a particularly strict standard of specificity is demanded. Reliance upon general allegations of fraud and corruption, or the repetitious characterizations of the conduct of a responsible official in those terms, will not satisfy this stringent standard. *Chicago Title & Trust Co.* v. *Fox Theatres Corp.*, 182 F. Supp. 18 (S.D. N.Y.).

Moreover, to raise an issue of fraud upon the court, the allegations must relate directly to the integrity of the decision sought to be set aside, and not merely to matters *inter partes*. See 7 Moore's *Federal Practice* (2d ed.), Sec. 60.33. Although such leading fraud-on-the-court decisions as *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U.S. 238, and *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514 (C.A. 3), certiorari denied *sub nom. Universal Oil Products Co.* v. *William Whitman Co.*, 335 U.S. 812, stand squarely for the proposition that a court may inquire

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[2] Fraud on the court has been defined as the product of an unconscionable scheme or plot to influence improperly a decision of the court (*England* v. *Doyle*, 281 F. 2d 304 (C.A. 9)) or as an attack on the institution of the court itself so that it cannot adjudicate impartially (*Martina Theatre Corp.* v. *Schine Chain Theatres, Inc.*, 278 F. 2d 798 (C.A. 2)). Examples include bribery of a court official, employment of counsel to exert improper influence on the court, abnegation by a judge of his judicial function, and involvement of an attorney in the fraud of his client or another by suborning their perjury.

into the integrity of even its "final" judgments, none suggests that a full-scale hearing is required in the absence of sufficient allegations indicating that such fraud has taken place. *Chicago Title & Trust Co.* v. *Fox Theatres Corp.*, *supra*, p. 38.

2. Tested by these principles, the decision of the court below is correct. Quite apart from recognizable deficiencies in pleading,[3] petitioners' attempts to taint the 1961 proceedings with fraud was correctly rejected because they failed to supply any causal nexus between the misconduct charged and the integrity of the judicial decision rendered. Specifically, the alleged $60,000 bribe is said to have been solicited in 1950, at the investigatory stage of the tax controversy. In the complete absence of any suggestion as to how this incident could have tainted with fraud the proceedings in the Tax Court eleven years later, the court below was justified in rejecting (Pet. App. 5a) petitioners' apparent, but unfounded, assumption that such acts of Internal Revenue agents would be chargeable to the Tax Court. Similarly, petitioners' allegations that their onetime counsel, John Potts Barnes, wrote a letter as Chief Counsel reversing the position he had taken when representing petitioners, collected a "sham" fee from them after becoming employed as Chief Counsel for the Internal Revenue Service, and visited with the Tax Court judge in chambers—even

[3] It is not enough to allege, without more, that "the judge was bribed" (*United States* v. *Shaughnessy*, 206 F. 2d 897, 904 (C.A. 2) (dissenting opinion)), nor is the requisite degree of specificity attained by attributing unlawful consequences to otherwise lawful conduct (*Chicago Title & Trust*, *supra*, p. 37).

if true[4]—would not constitute irregularities of sufficient import to impugn the integrity of the Tax Court decision. Thus, disposition of the petition for an investigation, without a hearing on the factual basis for the allegations, was proper.

3. Petitioners alternatively urge (Pet. 19-20) that, if their petition was insufficient, the court of appeals violated the Fourteenth Amendment by failing to grant them leave to amend it. There is, however, no provision for amendment as of right at the appellate stage of litigation. Rule 17, Rules of Practice, Tax Court of the United States (Rev. 1958, 1965 ed.); Rule 15, Federal Rules of Civil Procedure. To be sure, the discretion of a trial court in permitting amend-

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[4] The letter petitioners claim was written by Barnes as Chief Counsel has never been found to exist. The only documents in the record bearing Barnes' name are certain pleadings in the Tax Court; these bear his name because he was Chief Counsel. The court of appeals, in discussing the allegations against Barnes, apparently assumed that he had signed documents prepared by others in connection with the original case against the petitioner (Pet. App. 6a). A more likely assumption would have been that in accordance with I.R.S. practice, the signing of Barnes' name was the routine act of a subordinate in Regional Counsel's Office in Chicago, proceeding under a general delegation of authority.

In addition, we think it appropriate to add that the Department of Justice has been informed that the Inspection Division of the Internal Revenue Service, which reports directly to the Commissioner, investigated both the alleged bribe offer and the charges against Barnes in 1958. It concluded that the $60,000 "bribe" offer was, in reality, a written compromise proposal presented to petitioner to set his tax liability at $60,542.85 for the years 1944-1948. Mr. Barnes was also cleared of any impropriety in accepting a fee while Chief Counsel for professional work done for the petitioners prior to his appointment.

ment to a pleading may, in the interests of justice, be liberally invoked, especially in *pro se* proceedings; but such a request calls for the exercise of discretion that should not be overturned unless abused. In the absence of some showing in the court of appeals that amendment would cure the deficiencies, that court acted properly in not permitting it and in not remanding the case to the Tax Court for further consideration. See 3 Moore's *Federal Practice* (2d ed.), Sec. 15.08(4).[5]

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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[5] Leave to amend was granted in *Chicago Title & Trust Co., supra,* but that case involved extraordinary circumstances. Judge Manton had been convicted of dishonest judicial conduct in other matters and an unsavory atmosphere pervaded the entire receivership involved.

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